IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 558.

FEDERAL POWER COMMISSION,
Petitioner,

v.

PANHANDLE EASTERN PIPE LINE COMPANY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR INTERVENERS-RESPONDENTS, STOCKHOLDERS.

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Opinions Below.

The findings of fact, conclusions of law and opinion of the District Court appear in the Record (R. 49-50; 60-66). The opinion of the Court of Appeals (R. 74-81) is reported at 172 F. 2d 57.

Jurisdiction.

The judgment of the Court of Appeals was entered on January 6, 1949 (R. 81). The petition for certiorari was filed on February 10, 1949, and was granted on March 28, 1949 (R. 87). The jurisdiction of this Court is invoked under 28 U. S. C. §1254.

Question Presented.

Where the Federal Power Commission, having received ample advance notice that a "natural-gas company" proposed to issue to its stockholders a dividend in kind consisting of the stock of a newly-organized corporation, neither requested delay nor sought restraint of the transaction until after ownership of the new stock had passed from the declaring corporation to its stockholders, should a Federal District Court issue an order purporting to enjoin transfer of title to the stock or, by enjoining delivery to the stockholders of the certificates evidencing ownership of the stock, expose the stockholders to hardship and loss?

Statement.

Interveners-respondents are holders in the aggregate of approximately 8% of the common stock of Panhandle and of Hugoton (R. 44, 53).

ARGUMENT.

POINT I.

The District Court could not enjoin transfer of the ownership of the Hugoton stock to the Panhandle stockholders, as prayed for by petitioner, because the transfer had taken place before institution of suit.

The major facts bearing on the ownership of the Hugoton stock were summarized as follows by the District Court in its Findings of Fact (R. 62-63):

> "10. On October 11, 1948, the Board of Directors of Panhandle declared a dividend to the holders of

the common stock of Panhandle, payable in common stock of Hugoton at the rate of one-half share for each share of common stock of Panhandle, said dividend comprising the entire 810,000 shares of common stock of Hugoton acquired by Panhandle and all of the outstanding stock of Hugoton. Said dividend was declared to be payable November 17, 1948 to stockholders of record October 29, 1948.

"11. On October 29, 1948, Panhandle delivered to United States Corporation Company, the transfer agent for Hugoton stock, a certificate representing 810,000 shares of common stock of Hugoton registered in the name of Panhandle and endorsed in blank and, pursuant to the directions of Panhandle, said United States Corporation Company caused said shares of stock to be transferred to the names of the stockholders of record of Panhandle on October 29, 1948, caused Federal stock transfer stamps to be affixed and cancelled, and made out new certificates in the names of such persons and inserted the same in envelopes ready to mail, intending to mail said certificates on November 15 and November 16, 1948."

At the hearing before the District Court on November 18, 1948, the following colloquy took place (R. 42):

"Mr. Tarver: . . . It is agreed that there has been no transfer on the transfer books of Hugoton Corporation?

"Mr. Patterson: Oh, no. Quite the contrary. On the books of Hugoton Corporation the stockholders of record of October 29th are other stockholders and not Panhandle."

Notwithstanding the above facts, petitioner's complaint prayed the court to restrain Panhandle "from transferring the title to such shares of stock to such stockholders (of

Panhandle) or to any other person" and to require Panhandle to cause Hugoton to refrain "from issuing or transferring any of its capital stock to any person" (R. 9).

Obviously this prayer could not be granted if title to the Hugoton stock had passed from Panhandle to its stockholders. Under the authorities, such was unmistakably the case.

The Dividend Cases—Trust Fund Doctrine.

By virtue of the delivery of the 810,000 share certificate of Hugoton stock, endorsed in blank, by Panhandle to Hugoton's transfer agent, for distribution to the common stockholders of Panhandle, such 810,000 shares became in equity the property of the common stockholders of Panhandle (R. 63). The underlying principle is well established. *Bogert on Trusts*, Vol. 1, pages 88, 89 (1935), states:

> "If the corporation which has declared the dividend sets apart a fund to pay the dividend, as by opening a dividend account with a bank, it makes itself trustee of the claim against the bank for the persons entitled to the dividend, and such persons are entitled to the proceeds of the claim against the bank, even though the corporation may fail before the dividend is actually paid (*LeRoy* v. *The Globe Ins. Co.*, 2 Edw. Ch. 656; *Matter of LeBlanc*, 14 Hun (N. Y.) 8, aff'd 75 N. Y. 598; *In re Interborough Consol. Corp.* (D. C.) 267 F. 914.) * * * The dividend account cannot be taken for use in satisfying the creditors of the corporation generally. It is held in trust for the stockholders who have the right to receive the dividend * * *."

See to the same effect *White, New York Corporations* (Bender Ed.), Vol 2, pages 345-7; *Thompson on Corpora-*

tions (3rd Ed. 1927), Sec. 5308; *Ballantine on Corporations* (1946 Ed.), Sec. 238.

In *In re Associated Gas and Electric Co.*, 137 F. 2d, 607, 610 (C. C. A. 2nd 1943), a corporation had opened a special bank account and deposited therein funds to pay a dividend which it had previously declared. In subsequent reorganization proceedings, it was held that the stockholders were entitled to the funds in the account as against the trustees in reorganization. The court said, per Swan, J.:

> "Where a corporation has not only declared a dividend but has specifically set apart from its other assets a fund out of which the dividend is to be paid, such fund is held in trust for stockholders entitled to the dividend. *In re Interborough Consol. Corporation*, 2 Cir., 288 F. 334, 341, certiorari denied sub. nom. *Porges* v. *Sheffield*, 262 U. S. 752, 43 S. Ct. 700, 67 L. Ed. 1215; *Staats* v. *Biograph Co.*, 2 Cir., 236 F. 454, 458, L. R. A. 1917B, 728; *In re Interborough Consol. Corporation*, D. C. S. D. N. Y., 267 F. 914, 919."

In *Sherry* v. *Union Gas Utilities*, 20 Del. Ch. 60, 171 Atl. 188, 190 (1934), Chancellor Wolcott said:

> "When a dividend has been declared and moneys deposited for its payment, it has been determined that such deposit unsupplemented by other evidence is affected with a trust in favor of stockholders."

The so-called "trust fund" rule as to dividends has been "consistently followed in New York and elsewhere as the correct rule". Comment (1928) 28 Col. L. Rev. 477, 478; Note (1933) 11 No. Car. L. Rev. 111, 112; Note (1938) 24 Va. L. Rev. 579; Comment (1940) 39 Mich. L. Rev. 59, 64-5.

It applies, of course, to stock dividends and dividends in kind as well as to cash dividends. *Dock* v. *Schlichter Jute Cordage Co.*, 167 Pa. St. 370, 378-9, 31 Atl. 656 (1895); *Staats* v. *Biograph Co.*, 236 Fed. 454, 460 (C. C. A. 2nd, 1916); *Peckham* v. *Van Wagenen*, 83 N. Y. 40, 45 (1880); *Ford* v. *Easthampton Rubber Thread Co.*, 158 Mass. 84, 32 N. E. 1036 (1893).

The trust fund doctrine has been applied to the precise type of situation presented in the case at bar, viz.: declaration by a corporation of a dividend in the stock of another corporation, followed by delivery by the declaring corporation to the stock transfer agent of a block certificate of the dividend stock with directions to prepare certificates in appropriate amounts for the declaring corporation's stockholders. On such facts the Circuit Court of Appeals for the Ninth Circuit said in *Commissioner* v. *Scatena*, 85 F. 2d 729, 731 (1936):

> "A dividend declared by one corporation of the stock of another corporation is regarded as a cash dividend (Fletcher, Cyc. Corps. §3677, p. 6177), and its value is determined by the actual value of the stock of the subject of the dividend, on the date of the declaration. The lawful declaration of a dividend creates a debt from the corporation to the stockholders, and when a segregation is made to the amount of the dividend, the amount thereof is held by the corporation as trustee for the stockholders. In re Sutherland, 23 F. (2d) 595, 599 (C. C. A. 2); Bryan *v.* Welch, et al., 74 F. (2d) 964, 970 (C. C. A. 10); Bulger Block Coal Co. *v.* U. S., 48 F. (2d) 675, 680, 681 (Ct. Cl.); Staats *v.* Biograph Co., 236 F. 454, 458, L. R. A. 1917B, 728 (C. C. A. 2). Such a dividend cannot be rescinded. Fletcher Cyc. Corps. §3653, p. 6064; Morawetz, Corps. §445, p. 419."

On the principles set forth in the above authorities, equitable title to the Hugoton stock passed to the common stockholders of Panhandle on October 29, fifteen days before this suit was instituted.

Possession of the Certificates Is Not Essential to Ownership—Intention to Transfer Ownership Is Controlling.

The findings of fact quoted at pages 2-3, *supra*, show that Panhandle, by October 29, had done everything within its power to transfer the Hugoton stock to its stockholders and had relinquished all control and dominion over it. It is well settled that possession of the stock certificates is not controlling, and that this intention to transfer complete legal title, accompanied by all appropriate and feasible formal acts, is to be given effect.

As was said by this Court in *Richardson* v. *Shaw*, 209 U. S. 365, 378 (1908):

> "... the certificate of shares of stock is not the property itself, it is but the evidence of property in the shares. The certificate, as the term implies, but certifies the ownership of the property and rights in the corporation represented by the number of shares named."

Referring to the relation of stockholder and corporation and to stock ownership, this Court said in *National Bank* v. *Watsontown Bank*, 105 U. S. 217, 222 (1881):

> "This legal relation and proprietary interest, on which it is based, are quite independent of the certificate of ownership, which is mere evidence of title. The complete fact of title may very well exist without it."

This is also the established law in Delaware, New Jersey and New York.* In *Smith* v. *Universal Service Motors Co.*, 17 Del. Ch. 58, 147 Atl. 247, 248 (1929), Chancellor Wolcott said:

> "The status of stockholder in a corporation is not dependent on the issuance to him of a certificate of stock. The certificate is only an evidence of ownership—a muniment of title."

In *Lask* v. *Bedell*, 91 N. J. Eq. 341, 109 Atl. 849, 850 (Ch. 1919), it was held:

> "It is the recognized law of this state that the certificate of stock is merely evidence of ownership and that there need not be a certificate issued and delivered to vest a person with the rights of a stockholder."

In *Hoffman* v. *Commissioner*, 71 F. 2d 929 (C. C. A. 2nd 1934), a taxpayer desiring to sell stock of a corporation endorsed it in blank and delivered it to *his own* attorney to be turned over to the purchaser upon compliance with certain formalities. The attorney did not turn the stock over until a subsequent year. The court held that title to the stock passed to the purchaser when it was delivered to the seller's

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* The Delaware law would seem to be controlling on the question of ownership of the Hugoton stock, since Hugoton was organized in Delaware. Restatement, *Conflict of Laws* (1934 Ed.), §182, states:

> "Whether a person is a stock-holder or other member of a corporation is determined by the law of the state of incorporation."

See also *Seymour* v. *National Biscuit Co.*, 107 F. 2d 58 (C. C. A. 3rd 1939); *Triplex Shoe Co.* v. *Rice & Hutchens*, 17 Del. 356, 152 Atl. 342 (S. Ct. 1930); *In re Bashford's Estate*, 118 Misc. 951, 36 N. Y. Supp. (2d) 651 (Surr. Ct., N. Y. Co., 1947); *Marvel, Delaware Corporations and Receiverships* (1939), 136; *American Jurisprudence*, "Corporations", §330.

attorney, and loss on the sale was deductible in the earlier year. Judge Swan said (930):

> "But the law is well settled that nondelivery of possession would not preclude *title to the stock* passing forthwith to Dorman if such was the intention of the parties. Hatch *v.* Oil Co., 100 U. S. 124, 132, 25 L. Ed. 554; Hammer *v.* United States, 249 F. 336 (C. C. A. 2); Dahlinger *v.* Commissioner, 51 F. (2d) 662 (C. C. A. 3); Eavenson *v.* Commissioner, 51 F. (2d) 664 (C. C. A. 3); Sanitary Carpet Cleaner *v.* Reed Mfg. Co., 159 App. Div. 587, 145 N. Y. S. 218; Sherwood *v.* Commissioner, 8 B. T. A. 193; Swenson *v.* Commissioner, 14 B. T. A. 675. Not only did the seller, the buyer and the party with whom the certificates were deposited testify that the sale was intended to be consummated on July 9th, but statements and conduct of the parties at that time and thereafter were entirely consistent with such intention. The loss on the sale was sustained in 1926." (Italics supplied.)

In *Commissioner* v. *Scatena*, 85 F. 2d 729, 732, *supra*, it was held:

> "The respondent could be a shareholder in a corporation without ever receiving a certificate; so it would not make much difference when or if a certificate was received. See Pacific Nat. Bank *v.* Eaton, 141 U. S. 227, 233, 11 S. Ct. 984, 35 L. Ed. 702; Appeal of Minal E. Young, etc., 6 B. T. A. 472, 509. Whether the taxpayer received her certificates or whether they would have been delivered to her on demand, in the calendar year 1928, is, of course, purely speculative, but it is not vital to our discussion. *The declaring corporations had done all that it was possible for them to do to transfer title to the shares to the stockholders.*" (Italics supplied.)

See to similar effect *Pacific National Bank* v. *Eaton*, 141 U. S. 227, 234 (1891); *In re Penfield Distilling Co.*, 131 F.

(2d) 694, 698 (C. C. A. 6th, 1942); *Kansas O. & G. Ry.* v. *Helvering*, 124 F. 2d 460 (C. C. A. 3rd 1941); *Matter of Friedman*, 184 Misc. 639, 641, 54 N. Y. Supp. (2) 45 (S. Ct. N. Y. Co. 1945); *First National Bank* v. *Englewood Mutual Loan and Building Association*, 124 N. J. Eq. 369, 1 Atl. 2d, 871 (Ch. 1938); *Mau* v. *Montana Pacific Oil Co.*, 16 Del. Ch. 114, 141 Atl. 828, 831 (1928); *American Jurisprudence* "Corporations", Sec. 319; Christy, *The Transfer of Stock* (1940) Sec. 11.

Effect of Uniform Stock Transfer Act.

Petitioner urges that, under Section 1 of the Uniform Stock Transfer Act,* as construed in New Jersey, title to the Hugoton stock did not pass from Panhandle to the stockholder-interveners because there was no sufficient delivery within the meaning of Section 1.

The short answer to this contention is that the Court of Errors and Appeals of New Jersey has held that the Uniform Stock Transfer Act affects only legal title and has no bearing upon equitable title—which, beyond all question, is vested, in this case, in these interveners and those similarly situated. In *Martindell* v. *The Fiduciary Counsel, Inc.*, 133 N. J. Eq. 408, 415, 30 Atl. 2d 281, 286 (1943), it was held:

> "The Uniform Stock Transfer Law, R. S. 1937, 14:8-23, *et seq.*; N. J. S. A. 14:8-23, *et seq.*, has no

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* The Act was adopted in New York in 1913, in New Jersey in 1916 and in Delaware in 1935 (6 Uniform Laws, Annotated, 1949 Supp., 6). See McKinney's N. Y. Pers. Prop. L. §§162-185; N. J. S. A. 14:8-23—14:8-46; Del. Rev. Code 1935 §§2048a-2048x.

** Petitioner states in its brief that the intervener stockholders urged in the court below that the Uniform Stock Transfer Act was "controlling". Petitioner is in error. Intervener stockholders urged in the court below that title had passed under all possible criteria. Intervener-stockholders maintain the same position in this Court.

This brief was necessarily printed after receipt of petitioner's mimeographed draft, but before receipt of petitioner's printed brief. For this reason it was, unfortunately, impossible to include herein page references to petitioner's brief.

applicable to transfers of an equitable title; it governs the conveyance of the legal title only. *Stuart* v. *Sargent*, 283 Mass. 536, 186 N. E. 649.'"*

See also definition of "title" in Sec. 22 Uniform Stock Transfer Act, 6 Unif. Laws Annot. 25; *First National Bank* v. *Englewood Mutual Loan and Building Association*, 124 N. J. Eq. 360, 1 Atl. (2d) 871, 874 (Ch. 1938), *supra*; *Lask* v. *Bedell*, *supra*, 91 N. J. Eq. 341, 109 Atl. 849, 850; *In re Antkowski's Estate*, 286 Ill. App. 184 (1936); *Cliffs Corporation* v. *United States*, 103 F. (2d) 77 (C. C. A. 6, 1939); *East Coalinga Corp.* v. *Robinson*, 194 P. (2d) 561 (Cal. App. 1948).

There Was a Sufficient "Delivery" Under the Uniform Stock Transfer Act.

However, if compliance with Section 1 of the Uniform Act were essential, delivery of the Hugoton stock by Panhandle to the United States Corporation Company—which was not Panhandle's transfer agent as repeatedly stated in petitioner's brief, but was Hugoton's transfer agent (R. 32-33)—was a sufficient delivery to pass legal title under the Act. *Wills* v. *Investors Bankstocks Corp.*, 257 N. Y. 451 (1931); *Bayle* v. *First Nat. Bank*, 168 Misc. 398, 6 N. Y. Supp. (2d) 484 (S. Ct., 1937); *Meyer, Law of Stockbrokers and Stock Exchanges* (1936 Supp.) 65; *Hoffman* v. *Commissioner*, 71 F. (2d) 929, *supra*, this Point.

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* The expressions contained in the opinion of Vice Chancellor Buchanan in *Besson* v. *Stevens*, 94 N. J. Eq. 549, quoted in petitioner's brief, have seemingly ceased to be the law of New Jersey. The *Besson* case is not even referred to in the recent *Martindell* case, *supra*. In any event, the facts in the *Besson* case are readily distinguishable from those in the case at bar. The *Besson* case involved a purported gift of stock in a family corporation. The Vice Chancellor found that, although the controlling stockholder caused a transfer on the books of the corporation to be entered, he never lost dominion and control over the stock and had no genuine donative intent.

The Transfer on the Books Was Sufficient to Pass Title.

If any act beyond the delivery by Panhandle to the United States Corporation Company of the $10,000 share Hugoton certificate was necessary to complete transfer of legal title to the Hugoton dividend, the transfer on the Hugoton stock records was such act. *Marshall* v. *Commissioner*, 57 F. 2d 633 (C. C. A. 6th, 1932); *Wilmington Trust Co. v. General Motors Corp.*, 51 Atl. (2d) 584 (S. Ct. 1947); *Peets* v. *Manhasset Civil Engineers, etc.*, 68 N. Y. Supp. (2d) 338 (S. Ct., 1946); 24 *American Jurisprudence*, Sec. 80.

In the *Marshall* case, the court held (634):

> "Transfer upon the books of the corporation in itself constitutes a delivery."

In the *Wilmington Trust* case, the owner of stock in a corporation, intending to make a gift of the stock to his brother, caused the stock to be registered in the brother's name on the corporation's stock register. A new stock certificate was issued but was never delivered to the brother. A bill in equity was brought to determine ownership to the stock. It was held that transfer on the corporation's stock register was sufficient to transfer title to the stock. Chief Justice Richards said (593):

> "The general principle governing the gift of corporate stock is very clearly expressed in 24 *American Jurisprudence* 771 in the following language: 'Generally, there is a complete gift of corporate stock where, by the direction of its owner, it has been transferred to the donee on the books of the corporation, and a new certificate issued in the name of the donee, or a certificate is issued in the first instance in the name of the donee, although the

> certificate so issued is retained by the donor or the corporation, and is not delivered to the donee. . . .''

The *Peets* case was a suit for the enforcement of an agreement restricting the sale of corporate shares. Each party challenged the other's status as a stockholder. In the case of one party who claimed as a donee, it appeared that shares had been transferred to him on the books of the corporation. However, delivery of a certificate to him was not established. The Court held (68 N. Y. Supp. (2d) 338, 344):

> "The transfer of the shares upon the books of the corporation clothed Ward with *legal* title. That act as stated in Matter of Babcock, 85 Misc. 256, 266, 147 N. Y. 168, 174 (affirmed 169 App. Div. 903, 153 N. Y. S. 1105, 216 N. Y. 117, 111 N. E. 1084), 'stands in the place of a delivery. Such an act performs precisely the office which an actual delivery would perform if it were a chattel'.'' (Italics supplied.)

In the case of *In re Robert's Appeal*, 85 Pa. St. 84 (1877), the following appears:

> "* * * transferring the shares to her upon the books of the Company is putting her in complete possession of the thing assigned, and clothing her with the complete legal title. It stands in the place of a delivery. Such an act performs precisely the office which an actual delivery would perform if it were a chattel. It is as complete a delivery as the nature of the thing will admit of. There can be no clearer evidence of a design to part with the right of property in favor of another than an absolute transfer of the *legal* title to her for her own use. * * * The best evidence of her ownership is the transfer on the books of the Company. The certificates were but secondary evidence of her ownership, and only useful for purposes of transfer.'' (Italics supplied.)

See also Christy, The Transfer of Stock (2nd Ed., 1940), Section 54.

Under all the above authorities it is clear that full title to the Hugoton shares has, since October 29, been vested, not in Panhandle, but in the stockholder-interveners and those similarly situated. It was therefore unrealistic for petitioner to request the District Court to order Panhandle not to transfer, and to cause Hugoton not to transfer, title to the Hugoton shares to Panhandle's stockholders. The request was very properly denied.

POINT II.

Enjoining delivery to the Hugoton stockholders of the certificates evidencing ownership of their shares would inflict serious hardship on the Hugoton stockholders.

Some measure of the damage which would be caused by the issuance of an injunction in this case can be seen from the paralyzing effect of the District Court's restraining order and the stays on appeal. These restraints have compelled the Hugoton stockholders to stand still at their jeopardy while a Federal administrative agency seeks to extend its jurisdiction into an area from which it would appear to be specifically proscribed by statute. Among the results, present and prospective, of the existing situation are the following:

(1) Even though a person is the owner of the Hugoton stock, he cannot exercise one of the most important attributes of ownership. He cannot sell his stock for cash. All he can do is sell his stock on the over-the-counter market and receive a promise to pay for the stock when issued. When stock is sold on the New York Stock Exchange (and

the same is the case in over-the-counter transactions) the universal rule is that payment is required on the third full business day after the sale has been made. Should a person desire to sell his Hugoton stock, all he can receive is a contract to purchase, which, if the restraint is continued, does not have to be paid for until some indefinite time in the future. If there is a lengthy hearing before the Federal Power Commission and the Commission takes the case under advisement for a considerable period before rendering its decision, and the period be further prolonged by an appeal, it may be years before the seller receives payment. Instead of carrying the normal three-day risk on the solvency of the purchaser, the sellers will have to carry the risk indefinitely.

Petitioner in its brief contends that this hardship is "more fanciful that real". It claims (1) that "marking to the market" eliminates risk to the seller and (2) that the seller can obtain ready cash by assigning his over-the-counter contract to sell his Hugoton stock. As a practical matter, however, "marking to the market" only affords a degree of mitigation of the risk on the seller. And as long as the Hugoton dividend is involved in litigation no cash can be raised by assignment of contracts to sell Hugoton stock—as must be perfectly apparent to anyone familiar with securities transactions.

(2) If the requested injunction against delivery of the certificates should be granted, the rank and file of Hugoton stockholders will be strongly inclined to dispose of their shares, as a great many have already done (R. 26, 27, 63). Stock unrepresented by certificates is unattractive, for many reasons, to the average small investor. By the same token, this is a situation made-to-order for speculators, willing to do without certificates for a time, if the stock

itself can be purchased at a bargain. Accordingly, granting the injunction against delivery of the certificates would be most likely to enrich such speculators at the expense of the small Hugoton stockholders.

(3) When the Panhandle stock went ex-dividend on October 29, its price on the New York Stock Exchange immediately declined by approximately $5.00, thus reflecting the value of the Hugoton dividend as severed from the Panhandle assets—a fact of which this Court may take judicial notice. Panhandle stockholders who sold on the ex-dividend date and subsequently, were willing to accept the reduced price on the assumption that they would receive their Hugoton certificates on or about November 17. While their Hugoton certificates are withheld from them, this class of investors is in the dark tax-wise, as well as financially. For example: A Panhandle stockholder who purchased his stock at 65 and sold it ex-dividend at 60 on October 29, does not know whether he has sustained only a capital loss of $5.00 for each share of Panhandle which he sold, or whether he has also received ordinary income in the form of Hugoton stock.*

(4) It seems possible too that the Commissioner of Internal Revenue will seek to include the Hugoton dividend in the gross estate of any Panhandle stockholder dying after October 29, although, lacking the certificates, the estate cannot sell or pledge the stock for ready cash with which to pay the tax. *Helvering* v. *McGlue's Estate*, 119 F. 2d 167 (C. C. A. 4th, 1941).

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* Of course, the effect of all of the ex-dividend trading has been thrown into doubt as a result of the stays that have been issued, and inevitably confusion must exist in the stock market as to whether purchases of Panhandle include the Hugoton values or not.

(5) The crippling effect of the restraint of this dividend payment has spread to another quarter. Since the Hugoton stock was issued to Panhandle it has been freely bought and sold on the "over-the-counter" market. The Hugoton stock—unlike the "when, as and if issued" securities well known in railroad reorganizations—had been *issued* to Panhandle, so the only contingency in the minds of persons purchasing Hugoton before the Commission sought restraint of the transaction was the slight delay until the issued stock would be delivered on or about November 17. Under the New York Stock Exchange rules (Rule 550(d) 3a and 3b) such purchases are treated as margin transactions and 25% of the purchase price must be put up with a broker. In addition, the margin must be "marked to the market", which means that in the event of a price decline the purchaser has to put up additional collateral. Under New York law, such Hugoton purchasers are also liable for brokers' commissions whether or not the stock is ever delivered to them. *Sices* v. *Ungerleider*, 142 Misc. 402, 255 N. Y. Supp. 314 (App. Term, 1st Dept., 1931). A large amount of money is thus captured in brokers' accounts—not bearing interest. If an injunction is granted herein, it may be several years before these balances are released.*

Such illustrations of the hardships which would result from enjoining delivery of the Hugoton certificates might be expanded considerably. It is clear, however, on the basis of those set forth above, that the Hugoton stockholders will be exposed to severe financial loss and serious inconvenience, if the delivery of their certificates should be enjoined.

* In a footnote to its brief, petitioner suggests that purchasers of Hugoton stock have recognized that the requested injunction would not infringe any rights on their part. This is not so. A purchaser of 10,000 shares has registered vigorous opposition to the requested injunction. (R. 45).

In view of the well-established and authoritative interpretation previously given to the Natural Gas Act, which is contrary to the present claim of the Federal Power Commission, it is submitted that a wiser exercise of discretion would have led the Commission to choose for its test case one in which no such large and fluctuating values were at stake pending the determination of the proceeding.

POINT III.

The Commission's dilatory tactics alone are responsible for the fact that the injunction requested by it cannot be granted without irreparable injury to the rights of the Hugoton stockholders.

The petitioner in its brief contends that Panhandle is to blame for any hardships suffered by these interveners and those similarly situated.

This attempt to place the blame for the predicament of the Hugoton stockholders upon Panhandle will not stand analysis.

While the Commission issued an order on October 26, that order not only did not command Panhandle to hold up the payment of the Hugoton dividend but did not even request that Panhandle do so. The order announced only that the Commission intended to investigate "the facts and circumstances involved in the formation and proposed operation of the Hugoton Production Company and the transfer to said Company by Panhandle Eastern of the natural-gas reserves referred to above" (R. 11).

It may well be that if the Commission had issued a restraining order on October 26, Panhandle might have hesitated to continue with payment of the dividend. How-

ever, for it to have stopped the dividend on the strength of a mere investigatory order would have been inconceivable from a business point of view. Moreover, it would have been an invasion of the rights of the Panhandle stockholders and would most likely have precipitated suits against Panhandle on the part of its stockholders.

Petitioner in its brief urges that Panhandle "proceeded at its own risk" in going forward with the dividend distribution. It would have been exposing itself to greater risk in *not* so proceeding.

There is thus no substance whatever to petitioner's contention upon its brief that the hardships confronting these interveners and those similarly situated "are the consequence of Panhandle's private determination of law after due notice of the Commission's order of October 26, 1948. . . ."

On the contrary, it is apparent that *petitioner* is solely responsible for the involvement of the rights of these interveners and those similarly situated in this controversy between petitioner and Panhandle.

Petitioner was verbally informed of the proposed Hugoton dividend transaction on or about October 11 (R. 28). The proposed transaction also received wide publicity in the press (id.). For no apparent reason, however, petitioner failed until November 10, even to request Panhandle to delay the transaction, and in that interim of almost an entire month, as shown above, extremely valuable rights vested in Panhandle's stockholders.

The only excuse advanced by petitioner for its failure to take timely steps to stay the Hugoton dividend transaction before private rights became vested is that an investigation was necessary.

But the investigation was not even ordered until October 26, 15 days after the Commission was advised of the transaction. And, so far as appears, the actual investigation of Panhandle's files and the questioning of its officers required only *three days* (R. 36-37; 38). This is not at all surprising, since Panhandle is under the continuous supervision of petitioner and the facts allegedly uncovered by the investigation to support petitioner's jurisdictional theories must certainly have been in petitioner's files long before the Hugoton dividend transaction was initiated.

Making all due allowance for time required by the investigation and for consultation and decision within the Commission, petitioner, had it acted with reasonable despatch, might easily have instituted this suit while the Hugoton stock was still the property of Panhandle instead of the property of these interveners and those similarly situated, i. e., prior to October 29.*

Unquestionably, petitioner stands entirely responsible for the existing situation, which, as shown under Point II, has already caused much hardship to these interveners and others, and which would be greatly aggravated if petitioner should be granted the injunction.

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* As indicating that Federal administrative agencies can act with despatch in this type of situation, see *Securities and Exchange Commission* v. *Long Island Lighting Co.*, 148 F. 2d 252 (C. C. A. 2nd 1945). There the SEC learned *through the press* that the Lighting Company was undertaking a recapitalization. On the *next day*, the SEC was before the New York Federal District Court with an application to restrain the recapitalization.

CONCLUSION.

The decision below should be affirmed.

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Respectfully submitted,

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